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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAE JEONG LYU, Defendant and Appellant.	B272022 (Los Angeles County Super. Ct. BA439082)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Conditionally reversed and remanded with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Jae Jeong Lyu, a massage therapist, of several crimes arising out of a sexual assault on one of his clients during a massage. The trial court refused to give jury instructions on any lesser included offenses, even though the prosecutor requested instructions on some of them. Because there was substantial evidence to support instructions on lesser included offenses of one of the charges, and because the trial court's failure to give those instructions was not harmless, we conditionally reverse one of the convictions and remand for a possible new trial on that charge, and for resentencing. Otherwise, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Lyu Assaults His Victim During a Massage*

Vanessa S. was a ballet dancer. She rehearsed five days a week for one and a half to three hours. She attended reflexology classes and received massages regularly for sore muscles. One of the massage studios she went to was Seoul Sports Massage, where Lyu gave her two massages.

The first massage was without incident. It was "a standard, typical massage," and when Vanessa left she was fine and "in alignment." The second massage, a week later, was different.

Vanessa returned for the second massage because her back was out of alignment after she attended a sales conference for work. She arrived at Seoul Sports Massage at 7:30 in the

evening and, even though it did not appear busy, Lyu asked her to come back in an hour.

When Vanessa returned, Lyu escorted her to a room with doors that swung open and close. Lyu gave her a pair of shorts and a T-shirt to wear. Vanessa changed into the clothes, leaving her bra and thong underwear on underneath. Lyu returned with a tub of hot water for her feet and asked Vanessa to lie down on the table.

Lyu began to massage her upper body, including her head and shoulders, but he left the room several times to answer calls on his cell phone. At one point Vanessa told Lyu her psoas muscle near the intersection of her torso and leg was sore. Lyu began massaging the front of her hips.

Lyu's fingers brushed against an area "farther than most masseuse people do," which caused Vanessa to flinch. Lyu said, "Oh, it looks like your bladder is inflamed," which Vanessa thought was a strange statement to make. Lyu asked Vanessa to turn over and take her shirt off. Lyu watched Vanessa remove her shirt, which she thought was odd because usually massage therapists have their clients remove their shirts while they are face down on the massage table or hold up a towel to block their view. Vanessa turned away to "maintain [her] modesty," and Lyu asked her to take off her shorts. Lyu asked Vanessa to take off her underwear, but she refused. Vanessa lay down on the massage table, face down, and Lyu began to massage her back and spine.

Lyu's hands moved lower, to the upper part of her buttocks and hips, and she "felt his hands start to brush lower into—to the crack part" and "brush down the line and kind of sweep that portion down, which [was] odd." Lyu did this "all the way" down

the line of her buttocks. Vanessa tensed and flinched, and thought, "What are you doing? You are supposed to be doing other stuff."

Lyu asked Vanessa to turn over, and he placed a small hand towel across her breasts. Vanessa thought this "was so weird" because usually massage therapists give their patients full sized towels. Lyu began to massage the front of her hips. He said he was going to use lotion rather than oil because lotion did not leave a residue and he would not have to remove it or wipe it off later. As Lyu massaged her psoas muscle, she began to relax and "tune everything out," and she felt Lyu's fingers go under her underwear and massage her clitoris. She "froze" and thought, "Oh, my God, I don't understand, is this happening or is it? Seriously, is this happening? Did I flirt with him? I thought I came in for a massage. I don't understand. If he is doing this, what else is he going to do to me, right? I don't understand." She was confused and afraid "because if he crossed this boundary, he crossed this ethical boundary, right, and he is touching my genitalia, right, and what else does he not care about?" She was in "a suspended state almost where you don't feel anything." She waved her hands, she said, "No, no, no, no, no, no, no, no, no. I don't want that." Lyu put his fingers in and out of her vagina several times: "They went out and they went in. They went out and they went in. They went out and they went in." Lyu said, "It's good for your circulation." The penetration of her vagina lasted five to 10 seconds.

Lyu moved from the foot of the bed to the right side of the bed and turned Vanessa's body to the right side of the table. He moved her legs to the side, held down her left leg and her right hip with his right arm, opened her legs and held her hips "down

with both of his arms," and put his mouth on her genitalia. Lyu's lips and tongue went into her vagina, and she heard "sucking sounds." Her legs were in "a butterfly position, kind of like a diamond shape," and Lyu had his hands on either side of her hips and legs and was holding them down with force and "pressure" so that she could not close her legs. Vanessa was in shock, and could not move because she was afraid. She was in a "weird state of suspension" where she was unable to move. She thought, "I don't get it. I don't understand it. No, why is this happening? I don't understand." The oral copulation lasted approximately 10 seconds.

Lyu walked around the table to Vanessa's left side, grabbed her left hand, and put it on his erect penis. At this point she "snapped out of it," sat up, and said, "No, no, no, I don't want this." Lyu said, "It is because you are so beautiful," or words to that effect. She said, "We are done. We are done. No more." Lyu left quickly, returned with a warm towel and cleaned off her arms, legs, chest, and breasts, as well as her "genitalia and everywhere his mouth touched." "He spread apart [her] legs and he cleaned all of that." Vanessa was in a daze and kept thinking, "I don't understand what is happening."

Lyu left and Vanessa slowly got off the table and got dressed. She walked through the swinging doors and found the front office was dark and empty. Lyu was standing there and holding something for her to drink. She said, "That was not okay, whatever that was, that was not okay." He said, "Oh, oh, I am so sorry. Next time it won't happen, next time it won't happen." She said, "There's not going to be a next time." She refused the drink and walked to the door, which was locked. She said,

"Unlock the door. Let me out." Lyu ran over and unlocked the door. Lyu did not ask her to pay.

Vanessa described the experience to her boyfriend, who suggested she report the incident to the police. She took a shower immediately after she got home, and was unable to sleep. After speaking with a friend, Vanessa told the police what happened. The police took her to a rape treatment center for testing and treatment. The nurse who examined Vanessa found no evidence of physical injuries or of a sexual assault, which is not uncommon in cases of digital penetration, and not surprising in this case because Lyu had used a hot wet towel to clean Vanessa's genital area and she had taken a shower after she returned home.

Vanessa identified Lyu in a six-pack photographic lineup and in court. The prosecution also called a witness under Evidence Code section 1108 to testify about a massage Lyu had given the witness in 2009 where Lyu had inserted his fingers into her vagina.

B. *The People Charge Lyu with Four Crimes*

The People charged Lyu with three felonies arising out of his assault of Vanessa during the massage, and one misdemeanor involving Lyu's failure to register as a sex offender. In count 1, the People charged Lyu with sexual battery by touching an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse while the victim is unconscious because the perpetrator fraudulently represented the touching served a professional purpose, in violation of Penal

Code section 243.4, subdivision (c).[1] This count was based on Lyu's touching of Vanessa's vagina and his statement that it was good for her circulation. In count 2, the People charged Lyu with sexual penetration against his victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, in violation of section 289, subdivision (a)(1)(A). This count of forcible sexual penetration was based on Lyu's penetration of Vanessa's vagina with his finger. In count 3, the People charged Lyu with oral copulation against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, in violation of section 288a, subdivision (c)(2)(A). This count of forcible oral copulation was based on Lyu's conduct in putting his lips and tongue into Vanessa's vagina as he held her legs apart with his hands. Finally, in count 4, the People charged Lyu with failing to register as a sex offender within five days of changing his residence, in violation of section 290, subdivision (b).

C. *The Jury Convicts Lyu, and the Trial Court Sentences Him*

Lyu represented himself at trial, and the jury convicted him on all four charges. At sentencing, the court stated its "intent . . . to impose full terms on all counts." The trial court sentenced Lyu to consecutive high terms of eight years on count 2, forcible sexual penetration, in violation of section 289, subdivision (a)(1)(A), and count 3, forcible oral copulation, in violation of section 288a, subdivision (c)(2)(A). On count 1, sexual battery while fraudulently representing the touching served a

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[1] Undesignated statutory references are to the Penal Code.

professional purpose, in violation of section 243.4, subdivision (c), the court imposed one-third the middle term of three years, or one year, "because the charge is not a serious and violent felony," consecutive to counts 2 and 3. Finally, on count 4, failure to register as a sex offender within five days of changing his residence, in violation of section 290, subdivision (b), the court imposed the "full term of 364 days consecutive to be served in any penal institution." Lyu timely appealed.

DISCUSSION

A. *Substantial Evidence Supports Lyu's Conviction on Count 2*

Lyu argues substantial evidence does not support his conviction on count 2, forcible sexual penetration, because "the evidence was [in]sufficient to prove that he committed the act by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." He "concedes that he penetrated Vanessa's vagina with his finger but contends that such penetration was not accomplished as required by [section 289, subdivision (a)(1)(A)]." The People argue "there was substantial evidence supporting the element of force and the element of duress" because Vanessa "was in a vulnerable position, being mostly naked on a massage table," she was afraid Lyu would hurt her, and, although she was "frozen from fear," she "tried to make [Lyu] stop" and repeatedly told him "no."

"Our role when reviewing the sufficiency of the evidence is to evaluate the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid

value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Ramos* (2016) 244 Cal.App.4th 99, 104.) "'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.'" (*People v. Brooks* (2017) 2 Cal.5th 674, 729.) "Reversal on the basis of insufficient evidence is 'unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."'" (*People v. Truong* (2017) 10 Cal.App.5th 551, 556.)

The court instructed the jury on the meaning of duress with CALCRIM No. 1045: "Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and his or her [r]elationship to the defendant." Although unlawful sexual penetration requires an act of penetration committed with "the specific intent to gain sexual arousal or gratification or to *inflict abuse* on the victim," the intent requirement does not apply to "the act of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1541.) Thus, whether a victim is under duress depends not on the defendant's intent (*ibid.*) or on "'how the victim subjectively perceived or responded to this behavior,'" but on what a reasonable person of ordinary sensitivity would do or submit to under the same circumstances (*People v. Soto* (2011) 51 Cal.4th 229, 246). "[T]he focus must be on the defendant's wrongful act." (*Ibid.*) Thus,

even if the victim subjectively consents, a jury may still find there is duress.[2] (*Soto*, at p. 246.)

Substantial evidence supports the jury's determination that a reasonable person of ordinary sensitivity in Vanessa's vulnerable position would have submitted to Lyu's 10-second digital penetration while waving her hands and pleading with him to stop, rather than resisting physically. Before the assault, Vanessa was in a compromised, helpless position—lying down, mostly naked—and Lyu was hovering over her with his hands near the most private, vulnerable parts of her body. (See *People v. Icke* (2017) 9 Cal.App.5th 138, 145 [acknowledging the """inherent trust and confidence""" the victim placed in her chiropractor by allowing him """access to the most intimate parts of the body""" during a massage]; accord, *People v. Pham* (2009) 180 Cal.App.4th 919, 926.) A reasonable jury could find that a reasonable person in Vanessa's position would not have physically resisted for fear that Lyu would have responded with greater force and escalated the attack.[3] (Cf. *People v. Cochran* (2002) 103 Cal.App.4th 8, 14 ["'relative physical vulnerability'" can support a jury's finding of duress in a child sexual assault case].) Although the jury could have found duress under these

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[2] A violation of section 289, subdivision (a)(1)(A), requires, in addition to "force, violence, duress, menace, or fear of immediate and unlawful bodily injury," that the act be "accomplished against the victim's will." Lyu does not challenge the jury's finding that he sexually penetrated Vanessa against her will.

[3] In fact, even though Vanessa did not physically resist Lyu's digital penetration, Lyu did escalate the attack by using physical force to hold her legs open when he subsequently orally copulated her.

circumstances without victim testimony, both Vanessa and Lyu's prior victim testified they were afraid of what Lyu might have done had they resisted. (See *People v. Lyu* (2012) 203 Cal.App.4th 1293, 1296 [the victim "'froze' and was frightened, because she did not know what Lyu was capable of, and she thought: 'How do I get out of here safely?'"].)

Lyu relies primarily on *People v. Espinoza* (2002) 95 Cal.App.4th 1287, which he says "demonstrates that the evidence of duress was insufficient in this case." The facts in *Espinoza*, however, were very different. In *Espinoza*, the defendant repeatedly molested his 12-year-old daughter and was charged with lewd conduct on a child, forcible lewd conduct on a child, and attempted rape. (*Id.* at pp. 1292-1293, 1295.) During the incident giving rise to the forcible lewd conduct on a child and attempted rape charges, the victim "offered no resistance" and "made no oral or physical response to [her father's] acts." (*Id.* at p. 1320.) When she "'moved' to prevent defendant's penis from going inside her," he "discontinue[d] his conduct" and apologized. (*Id.* at pp. 1293, 1320, fn. 8.) The court in *Espinoza* found "insufficient evidence of duress," reasoning: "While it was clear that [the victim] was afraid of defendant, no evidence was introduced to show that this fear was based on anything defendant had done other than to continue to molest her. It would be circular reasoning to find that her fear of molestation established that the molestation was accomplished by duress based on an implied threat of molestation." (*Id.* at pp. 1292, 1321.) Vanessa, on the other hand, waved her hands and pleaded with Lyu to stop putting his fingers inside her. Like Vanessa, a reasonable person in Vanessa's position might have feared that, if she resisted physically, Lyu not only would have continued but

would have escalated the attack. There is no "circular reasoning" here.

B. *The Trial Court Prejudicially Erred in Failing To Instruct on Lesser Included Offenses of Count 2*

Lyu argues, among other things, the trial court had a sua sponte duty to instruct the jury on several lesser included offenses to count 2, forcible sexual penetration. In particular, Lyu maintains the court erred in failing to instruct on assault (§ 240), battery (§ 242), assault with intent to commit forcible sexual penetration (§ 220, subd. (a)(1)), and sexual battery (§ 243.4, subd. (a).)[4]

Prior to the close of evidence, the court tentatively ruled that it was not required to instruct the jury on any lesser included offenses. Quoting an appendix to pattern jury instructions no longer in use (CALJIC) and citing a disapproved Court of Appeal decision from the mid-1980's (*People v. Callan*

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[4] "[S]ection 243.4, subdivision (a) defines sexual battery as 'touch[ing] an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched or is for the purpose of sexual arousal, sexual gratification, or sexual abuse.' 'Touching' as used in that section is defined as 'physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense.' (§ 243.4, subd. (f).) Misdemeanor sexual battery contains the same elements except that unlawful restraint is not required. (§ 243.4, subd. (e)(1).) The touching element of misdemeanor battery also is different, as contact with the victim's skin is not required but may occur through clothing. (§ 243.4, subd. (e)(2).)" (*People v. Ortega* (2015) 240 Cal.App.4th 956, 966.)

(1985) 174 Cal.App.3d 1101, disapproved in *People v. Lopez* (1998) 19 Cal.4th 282, 292), the trial court stated: "'If the elements of both offenses are identical . . . there is no possibility of a factual finding by the jury consistent with the lesser rather than the greater. As such, submitting verdict forms, allowing a conviction for a misdemeanor as opposed to the charged felony in a wobbler situation is simply asking the jury to make a decision based solely on what they believe to be the appropriate penalty for the charge. This is improper, and the quote is, "if the evidence is such that a defendant if guilty at all was guilty of the greater offense, the lesser offense should not be given even if requested."'" The court ruled, "Here it would appear to me that Mr. Lyu is arguing based on his cross-examination and the evidence that has been presented on his behalf that it was an issue of consent. It is his word against the victim that it is an issue of consent. That is not going to make a difference in terms of the lesser included and the greater charges. It is his word against hers in terms of consent. Is consent an appropriate instruction? Yes, I've included that, but to give lesser and includeds, I don't believe is appropriate here because that would only trigger for the jurors the possibility of what is the greater punishment and what is not."

Although phrased as a tentative ruling, the trial court never again addressed the issue of instructing on lesser included offenses, and the court did not give any such instructions. The trial court's failure to instruct on any lesser included offenses of count 2 was error.

A trial court has a sua sponte obligation to instruct the jury on an offense that is necessarily included in a charged offense if there is substantial evidence the defendant committed only the

lesser offense. (*People v. Smith* (2013) 57 Cal.4th 232, 239-240; see *People v. Brothers* (2015) 236 Cal.App.4th 24, 29 ["[t]he trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater"]; accord, *People v. Nelson* (2016) 1 Cal.5th 513, 538.) The court has a duty to instruct on a lesser included offense even if the defendant objects to the instruction and the lesser offense theory conflicts with the defendant's theory of defense. (*People v. Moye* (2009) 47 Cal.4th 537, 548-549; see *People v. Breverman* (1998) 19 Cal.4th 142, 162-163 ["substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself"]; accord, *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.) ""Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed.'" (*Moye*, at p. 553.) On the other hand, a court has no obligation to instruct on a theory that has no support in the evidence. (*Smith*, at p. 240; *People v. Brown* (2016) 245 Cal.App.4th 140, 152; see *People v. Valdez* (2004) 32 Cal.4th 73, 116 [""[s]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense""].) We review de novo whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113; *People v. Chestra* (2017) 9 Cal.App.5th 1116,1122; *People v. Woods* (2015) 241 Cal.App.4th 461, 475.)

The People concede that "[a]ssault, battery and assault with intent to commit forcible sexual penetration are all lesser

included offenses of forcible sex crimes," like forcible sexual penetration. The People also state, as does Lyu, that sexual battery may be a lesser included offense of forcible sexual penetration, although we note that in this case it was not.[5] The notes and commentary to CALCRIM No. 1045 include assault, battery, and assault with attempt to commit forcible sexual penetration as lesser included offenses of forcible sexual penetration under section 289, subdivision (a)(1). (See *People v Hughes* (2002) 27 Cal.4th 287, 366 [battery is a lesser included

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[5] Under the statutory elements test, sexual battery is not a lesser included offense of forcible sexual penetration. "Because the forcible sexual penetration statute encompasses different types of contact than the sexual battery statute, it is possible to commit the greater without committing the lesser (e.g., where penetration is accomplished by means other than a part of the perpetrator's body.) Sexual battery is therefore not a lesser included offense of forcible sexual penetration under the statutory elements test." (*People v. Ortega* (2015) 240 Cal.App.4th 956, 967.) "'Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.'" (*People v. O'Malley* (2016) 62 Cal.4th 944, 984.) Where the facts in the accusatory pleading allege the defendant's fingers were the only object that forcibly penetrated the victim's genital or anal opening, sexual battery is a lesser included offense of forcible sexual penetration. (*Ortega*, at p. 967.) Although the information in this case alleged forcible sexual penetration with a foreign object and the evidence at trial was that Lyu forcibly penetrated Vanessa with his fingers, the information did not allege the foreign object was Lyu's finger. Therefore in this case, sexual battery was not a lesser included offense of forcible sexual penetration under the accusatory pleading test.

offense of forcible sodomy and rape]; *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1476-1477 [assault with attempt to commit rape is a lesser included offense of rape].) The People argue only that there was insufficient evidence to support giving instructions on any lesser included offenses.

There was substantial evidence, however, that Lyu committed battery or assault with intent to commit forcible sexual penetration but not forcible sexual penetration. Vanessa testified that as she lay on her back and Lyu massaged her psoas muscle, she felt his fingers move to her vagina. She said he crossed a boundary and touched her genitalia. There was no evidence at this point that Lyu used any force or restraint beyond the force necessary to commit the act of penetrating Vanessa's vagina. (See *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1024 ["'[a] defendant uses "force" if the prohibited act is facilitated by the defendant's use of physical violence, compulsion or constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act'"]; accord, *People v. Soto* (2011) 51 Cal.4th 229, 242; *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005; cf. *People v. Griffin* (2004) 33 Cal.4th 1015, 1027 [unlike rape under section 261, "in order for the statutory scheme of section 288 to make sense, the Legislature must have intended that the 'force' required to commit a forcible lewd act under subdivision (b) be substantially different from or substantially greater than the physical force inherently necessary to commit a lewd act proscribed under subdivision (a)"].) This was not a case where Lyu was either guilty of the offense of forcible sexual penetration or not guilty of any crime. (Cf. *People v. Weddington* (2016) 246 Cal.App.4th 468, 490 ["no instructional

duty arises if the evidence establishes that the defendant, if guilty at all, was guilty of the greater offense"].)

There was no substantial evidence, however, to support an instruction on simple assault. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; see *People v. Leonard* (2014) 228 Cal.App.4th 465, 486.) "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) "'An assault is an incipient or inchoate battery; a battery is a consummated assault.'" (*People v. Cook* (2017) 8 Cal.App.5th 309, 313; see *People v. Chance* (2008) 44 Cal.4th 1164, 1171-1172 ["it is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault"].) It is impossible to commit battery without assault. (See *People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228; *People v. Colantuono* (1994) 7 Cal.4th 206, 216-217; *People v. Wright* (2002) 100 Cal.App.4th 703, 721.) Here, the evidence was undisputed (and Lyu concedes) that Lyu consummated the assault and committed battery by touching Vanessa's vagina. There was no evidence Lyu committed simple assault but not battery. Therefore, the court did not err in refusing to instruct the jury on assault.

Even the prosecutor recognized the court had a sua sponte duty to give instructions on lesser included offenses. When the prosecutor first asked the court to instruct the jury on lesser included offenses, the court (incorrectly) stated, "The lesser includeds are always required if someone requests it. At this point no one is requesting it. I am not inclined to prepare them. That would be up to you." At a later hearing concerning the jury

instructions, the prosecutor delicately and apologetically raised the issue again.

"[The prosecutor:] I think the court asked me not to address this, so excuse me, but throughout this, there is a lesser included of assault and that [section] 240 assault lesser is 915, 915 is the CALCRIM instruction on that. I really think it needs to be given in light of the facts before us.

"The Court: Anything else?

"[The prosecutor:] I would like [CALCRIM No.] 925 as a lesser of a straight battery on count 2 because that is a lesser included.

"The Court: Anything else?

"[The prosecutor]: No."

The People argue the trial court did not err in failing to instruct on lesser included offenses because, as the trial court (incorrectly) stated, the "issue at trial was whether [Vanessa] consented to sexual penetration or whether the penetration occurred against her will. If [Vanessa's] testimony was believed, [Lyu] digitally penetrated her by means of force or fear. If the defense version of events was credited, no crime occurred at all. There was no substantial evidence upon which the jury could have reasonably absolved [Lyu] of the greater crime of digital penetration by force or fear but not the lesser crimes of assault, battery, or assault with intent to commit forcible sexual penetration."

The People, however, do not provide any citations to the record in support of their assertion that the issue at trial was whether Vanessa consented to the penetration or that consent was Lyu's only or even primary defense. Lyu did ask Vanessa on cross-examination whether during her interview with a police

detective she told the detective she did not say "no" when Lyu put his lips on her vagina, and Vanessa answered that she shook her head and repeatedly said "no." These questions may have been designed to elicit testimony that Vanessa did not object to Lyu's conduct. But Lyu also asked Vanessa questions about whether he had used force, including whether he had twisted her arm, put a knife to her neck, or put a gun to her head, and Vanessa answered "no" to each question (although she added to her last answer, "You held me down"). Moreover, even if Lyu's questioning of Vanessa on cross-examination can be interpreted as raising the issue of consent, and even if consent was Lyu's theory of the case, the trial court still had a duty to instruct on lesser included defenses supported by substantial evidence. (See *Moye*, *supra*, 47 Cal.4th at pp. 548-549; *Millbrook*, *supra*, 222 Cal.App.4th at p. 1137.) Finally, in closing argument, Lyu specifically argued there was no evidence he used force: "[S]he said that I forcefully penetrated her vagina. There was no testimony saying anywhere that I threatened her or intimidated her. I'm a man and she's a woman. You cannot guarantee that there was fear just because of that one fact. And, also, there was no bodily injury at all, not even one. And the third charge [forcible oral copulation]—it's the same thing, same thing. It's the same thing. I did not threaten her, intimidate her, use force on her, or use violence on her."

People v. Callan, *supra*, 174 Cal.App.3d 1101, relied on by the trial court, is distinguishable. The court in *Callan* held that former section 647a (now section 647.6, subdivision (a)(1)), misdemeanor child molestation or annoyance, is a lesser included offense of section 288, committing a lewd act upon a child under the age of 14, but that the trial court in that case did not err in

failing to instruct on that lesser included offense. (*Callan*, at pp. 1112-1113.) Because the Supreme Court in *People v. Lopez*, *supra*, 19 Cal.4th 282, reversed the lesser included holding of *Callan* and held that "section 647.6, subdivision (a), is not a lesser included offense of section 288, subdivision (a), under either the elements test or the accusatory pleading test" (*Lopez*, at p. 294), the continued precedential value of this portion of the court's opinion in *Callan* is questionable. Moreover, Lyu, unlike the defendant in *Callan*, does not dispute he committed a sexual act; he argues he committed the act without force or violence. In addition, the court in *Callan* stated the instruction on the lesser included offense of child molestation "would have been inconsistent with [the defendant's] defense." (*Callan*, at p. 1113.) Here, putting aside that the court has a duty to instruct on lesser included offenses supported by substantial evidence even if inconsistent with the defendant's defense, instructions on lesser included offenses would have been consistent with Lyu's argument to the jury that he did not use force, violence, threats, or intimidation.

Finally, the trial court's error in failing to instruct on the lesser included offenses was not harmless. We review the erroneous failure to instruct on lesser included offenses that are supported by the evidence for prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Beltran* (2013) 56 Cal.4th 935, 955; *Breverman*, *supra*, 19 Cal.4th at p. 178.) "Under that standard, reversal is warranted only if it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Cady* (2016) 7 Cal.App.5th 134, 149.) "Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is

likely to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, at p. 177.)

Had the trial court instructed the jury on the applicable lesser included offenses of forcible penetration, it is reasonably probable the jury would have convicted Lyu of one of these offenses rather than the greater offense. The evidence was that Lyu moved his hands from massaging Vanessa's psoas muscle to massaging her clitoris quickly and without any accompanying use of force beyond what was necessary to put his finger in her vagina. As opposed to the oral copulation of Vanessa, the crime charged in count 3, Lyu sexually penetrated Vanessa in a way that the jury reasonably could have found amounted only to an assault or battery. Therefore, the failure to instruct on any lesser included offenses was not harmless. (See *People v. Hayes* (2006) 142 Cal.App.4th 175, 183 ["[a]pplying the *Watson* harmless error standard, it is reasonably probable that appellant would have obtained a more favorable outcome if the jury had not been presented with an unwarranted all-or-nothing choice between conviction of the charged offense and complete acquittal"].)

"When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense, or accepting a reduction to the lesser offense." (*People v. Kelly* (1992) 1 Cal.4th 495, 528; see

Brown, supra, 245 Cal.App.4th at pp. 155-156.)[6] Therefore, we will conditionally reverse the judgment of conviction on count 2 and allow the People to retry Lyu on that charge pursuant to section 1382, subdivision (a)(2). If the People decide not to retry Lyu on that count, then the trial court is to enter a judgment of conviction on count 2 of the lesser included offense of battery, and resentence Lyu on all counts.

C. *The Trial Court Did Not Prejudicially Err in Failing To Instruct on the Lesser Included Offenses of Count 3*

Lyu argues, and the People do not dispute, that assault, battery, and assault with intent to commit forcible oral copulation are lesser included offenses of forcible oral copulation. The notes and commentary to CALCRIM No. 1015 list assault, battery, and assault with intent to commit oral copulation as lesser included offenses of oral copulation by force, fear, or threats under section 288a, subdivision (c)(2). (See *Hughes*, *supra*, 27 Cal.4th at p. 336; *In re Jose M.*, *supra*, 21 Cal.App.4th at p. 1477; see, e.g., *Brown v. Superior Court* (2010) 187 Cal.App.4th 1511, 1523 [jury acquitted the defendant of forcible oral copulation but convicted him "of the lesser included offense of misdemeanor battery"]; *People v. Elam* (2001) 91 Cal.App.4th 298, 308 ["[i]nasmuch as assault with intent to commit forcible oral copulation is merely a simple assault committed with the specific intent to force the victim to commit oral copulation

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[6] Because substantial evidence supports the jury's verdict on count 2, we do not "modif[y] [the] conviction to reflect a lesser included offense." (*People v. Robinson* (2016) 63 Cal.4th 200, 211.)

[citation], simple assault is a lesser offense necessarily included in the greater offense"].)

Lyu "does not dispute that the evidence was marginally sufficient to support the conviction on the greater offense" of forcible oral copulation, and he acknowledges he "cannot reasonably claim that Vanessa wanted [him] to orally copulate her." And rightfully so: There was evidence that Lyu put Vanessa's legs in "a butterfly position" and held her legs open in that position with force. And as noted, Vanessa testified on cross-examination that Lyu held her down. But Lyu argues there was substantial evidence from which a reasonable jury could have concluded "that the moving of Vanessa's legs and hips was nothing more than gently positioning Vanessa's leg for [him] to gain access to her vagina and that any 'force' used was not intended to, nor did it, overcome her will."

We think not. The only evidence was that Lyu orally copulated Vanessa through the use of force, not gentle repositioning. Lyu used two arms to pin Vanessa's hips to the table and forcibly opened Vanessa's legs and kept them open while he orally copulated her. He did not merely reposition her "gently" to gain access to her vagina; he held her down against her will with her legs open in order to keep his mouth on her vagina. There was no substantial evidence that Lyu committed a lesser included offense but not forcible oral copulation. And even if there were, any error in failing to instruct on the lesser included offenses of count 3 was harmless. The evidence Lyu committed forcible copulation was strong, while the evidence he committed any lesser crime was weak, if not non-existent. There is no reasonable probability that, had the trial court instructed on

lesser included offenses, the result on count 3 would have been any different.[7]

DISPOSITION

Lyu's conviction on counts 1, 3, and 4 are affirmed. Lyu's conviction on count 2 is conditionally reversed. The case is remanded with directions that, if the People do not retry Lyu on count 2 pursuant to section 1382, subdivision (a)(2), within 60 days after the remittitur is filed in the trial court, or, if the People file a written election not to retry Lyu on that count, the trial court is to proceed as if the remittitur modified the judgment

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[7] Because we are conditionally reversing the conviction on count 2 and remanding with directions that include resentencing, we do not reach Lyu's contentions that the trial court erred in imposing consecutive sentences on counts 2 and 3 and that section 654 precluded the court from punishing Lyu both for his convictions on counts 1 and 2. (See, e.g., *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1309 ["appellant's claims . . . concern[ing] the trial court's imposition of a consecutive sentence . . . . are obviously mooted by our reversal of his conviction on that count"]; *People v. Orellano* (2000) 79 Cal.App.4th 179, 186 [reversing convictions "so that appellant can be retried before a properly instructed jury," which "renders moot . . . the Attorney General's contentions of sentencing error"].) Lyu can raise his contention regarding the imposition of the $780 penalty assessment at the new sentencing hearing.

to reflect a conviction on count 2 for battery, and resentence Lyu on all counts accordingly.

SEGAL, J.

We concur:

ZELON, Acting P. J.

SMALL, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.